Nos. 80-1343, 80-1408

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AERONAUTICAL RADIO, INC. and
AIR TRANSPORT ASSOCIATION OF AMERICA
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents

UNITED STATES OF AMERICA,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. The question raised by both the petition of the United States and the petition of Aeronautical Radio, Inc. and Air Transport Association of America ("ARINC") is whether an order of the Federal Communications Commission accepting a tariff filing is subject to judicial review, when (a) the error allegedly committed by the FCC was its not requiring submission of tariff supporting material under a procedural filing rule adopted by the Commission as an aid to its unreviewable suspension and investigation authority and (b) statutory complaint procedures are available to the carrier's customers to assure the justness and reasonableness of the rates applicable upon the effectiveness of the tariff.

2. The additional question raised only by ARINC's petition is whether a tariff filing terminating a discount bulk rate schedule constitutes a discontinuance, reduction or impairment of service requiring a certificate of public convenience and necessity under Section 214(a) of the Communications Act where, as the FCC has long held, the services provided under the bulk rate schedule are the same as, and utilize the same facilities as, services available under other provisions of the carrier's tariffs, with the only difference being in the applicable rates.

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BRIEF OF RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Respondent, American Telephone and Telegraph Company ("AT&T"),[1] respectfully requests that the

[1] AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests in: The Pacific Telephone and Telegraph Company; The Southern New England Telephone Company; Cincinnati Bell Incorporated; and Cuban American Telephone and Telegraph Company.

Court deny the petitions for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT OF THE CASE

This case arises from the Federal Communications Commission's acceptance for filing, without suspension or investigation, of AT&T's March 23, 1977, tariff revisions providing for the termination of its TELPAK bulk rate schedule for private line services. The Commission denied petitions to suspend and petitions to reject the tariff filing in an order released June 13, 1977. *AT&T, Revisions to Tariff FCC Nos. 258 & 260,* 64 F.C.C.2d 959, *recon.* 64 F.C.C.2d 958; 65 F.C.C.2d 7 (ARINC App. 67, 79, 80).[2]

The TELPAK rate schedule involves the provision of private line communications in bulk quantities at rates discounted significantly from those for single-channel private line offerings. TELPAK was designed for large volume users and was intended to provide these users with a price alternative to other bulk communications means, particularly private microwave systems. As most recently constituted, TELPAK has been available in classifications of 60 and 240 voice-grade private line channels (TELPAK C and D, respectively).

Soon after the initial TELPAK tariff was filed in 1961, the FCC instituted an investigation (Docket 14251) in which it found that the services available at the discounted TELPAK rates, on the one hand, and the services available under AT&T's single-channel private line tariffs, on the

[2] "ARINC App." and "ARINC Pet." refer, respectively, to the appendix and petition filed by ARINC in No. 80-1343. "U.S. Pet." refers to the petition of the United States in No. 80-1408.

other hand, were "like" services under the Communications Act. *AT&T, TELPAK Service & Channels,* 38 F.C.C. 370, 377-79 (1964); 37 F.C.C. 1111, 1113-14 (1964); 38 F.C.C. 761 (1965). The Commission based this determination on the facts that "a customer may obtain any service or combination of services under private line tariffs that he can under TELPAK," and "the facilities over which any service or combination of services is rendered . . . will be the same whichever rate schedule, TELPAK or private line, is applied." 37 F.C.C. at 1113.

Proceeding from its "like" services finding, the Commission analyzed the TELPAK rates to determine if the differentials from single-channel private line rates were justified under Section 202 of the Communications Act (47 U.S.C. §202) (ARINC App. 200). The Commission held that the differentials had not been justified on a cost basis because "there are no material cost differences between such services furnished under TELPAK on a volume basis and those furnished under the other private line tariffs on a circuit-by-circuit basis" (38 F.C.C. at 381), but the Commission concluded that the TELPAK C and D classifications were justified on the basis of competitive necessity. 38 F.C.C. at 395; 37 F.C.C. at 1117.

The Commission's decision in Docket 14251, including its like services finding, was affirmed in *American Trucking Associations, Inc.* v. *FCC,* 377 F.2d 121 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 943 (1967). Thereafter, the Commission continued its investigation of TELPAK in a series of extensive proceedings culminating in Docket 18128. At issue in these proceedings were such matters as the compensativeness of the TELPAK rate levels and the justness and reasonableness of particular TELPAK rate changes (ARINC App. 6-8, 86-90).

While the Commission's investigation of TELPAK was still pending, the FCC in 1977 adopted a new policy which

resulted in bulk offerings such as TELPAK no longer being economically viable. Under this new Commission policy, AT&T was required to make its private line offerings, including TELPAK, subject to resale and unlimited sharing.[3] In a resale and unlimited sharing environment, single-channel private line users would enter into joint use arrangements (sharing) or would purchase resold TELPAK in order to take advantage of the lower bulk rates. This would result in the provision of substantially all voice-grade private line services at the discounted TELPAK rates, regardless of whether individual users could practically avail themselves of bulk communications alternatives, and thus would undermine the very premise of the TELPAK offering.[4]

Consequently, following the FCC's *Resale and Shared Use* decision, AT&T in March 1977 filed under Transmittal No. 12714 tariff revisions to terminate the TELPAK offering. Various TELPAK customers thereupon petitioned the Commission to suspend and investigate or to reject the tariff filing on several grounds, including AT&T's not having provided the economic and other data specified for a "tariff change" in Section 61.38 of the Commission's Rules (47 C.F.R. §61.38) (ARINC App. 209-11) and AT&T's not having obtained a certificate of public convenience and necessity under Section 214 of the Communications Act (47 U.S.C. §214) (ARINC App. 207-09) for an alleged "discontinuance of service."

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[3] See *Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *recon.* 62 F.C.C.2d 588 (1977), *aff'd sub nom. American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[4] As the Court of Appeals for the Second Circuit had previously recognized, the "essence of Telpak is a reduced rate limited to large volume users," and therefore any action imposing a requirement of unlimited sharing "has the practical effect of overturning the Telpak rate structure itself." *American Tel. & Tel. Co.* v. *FCC*, 449 F.2d 439, 452 (2d Cir. 1971).

In the orders under review in the court of appeals, the Commission accepted the tariff revisions for filing, ruling that the tariff revisions "are not *prima facie* unlawful and should not be rejected nor suspended and investigated" (ARINC App. 76). With respect to the Rule 61.38 issue, the Commission held that the TELPAK filing was "not the type of tariff revision to which Section 61.38 was intended to apply" and that, in any event, the Commission would "waive 47 C.F.R. §61.38 *sua sponte* insofar as it is applicable to the instant tariff filing" (*id.* at 74). With respect to the Section 214 argument, the Commission found that the termination of TELPAK was not a discontinuance of service because the services offered under TELPAK "are still available from AT&T pursuant to other tariffs or other sections of AT&T's [private line] Tariff . . .; only the rates differ" (*id.* at 73).

Several TELPAK users sought review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit. Taking advantage of its role as a statutory respondent, the Department of Justice, on behalf of the Government agencies as TELPAK users, also opposed the FCC's decision on review.[5]

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[5] On July 21, 1977, immediately prior to the effective date of Transmittal No. 12714, the court of appeals denied various motions by the TELPAK users (including the Department of Justice) seeking a stay, mandatory injunction and summary reversal of the Commission's order, but the court also ordered *sua sponte* that AT&T be "enjoined from discontinuing the Telpak offering to customers served and under the terms and conditions existing" as of that date (U.S. Pet. 10a-13a). Thereafter, AT&T filed and made effective tariff revisions which: (1) provided that the TELPAK offering be terminated as of July 22, 1977, but (2) preserved the TELPAK offering as to existing customers as required by the court's order. Because of post-judgment orders entered by the court of appeals, the July 21, 1977 injunction is still in effect pending disposition of the instant petitions by this Court.

In decisions of June 24 and November 5, 1980, the court of appeals unanimously rejected the TELPAK users' arguments.[6] With respect to the contention that the Commission abused its discretion in accepting the tariff filing without requiring data pursuant to Rule 61.38, the court held that "appellate courts have no power to interfere with agency discretion by undertaking to review suspension, investigation and rejection decisions" (ARINC App. 60). Relying on *Southern Railway* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658 (1963); and *Papago Tribal Utility Authority* v. *FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, No. 80-456 (Dec. 15, 1980), the court explained that the Commission's decision to accept the filing "is a 'necessary adjunct to the unreviewable decision to suspend and investigate,' " and thus, like suspension and investigation decisions, must be "reserved to Commission discretion" (ARINC App. 59). Moreover, specifically as to the Commission's alleged error in not requiring Rule 61.38 data, the court, relying on *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), held, because the rule was adopted "primarily to aid the Commission in exercising its discretion as to investigation and suspension of tariff filings," that "the FCC's determination as to what data it requires in making this discretionary decision cannot provide a basis for this court to mandate rejection of the tariff filing" (ARINC App. 61).

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[6] In its decision of June 24, 1980, the D.C. Circuit held that the Commission had "abused its discretion" in not requiring tariff supporting material under FCC Rule 61.38. However, the court vacated this determination in its November 5 decision on rehearing in light of the recent decisions in *Southern Railway* and *Papago*, both of which were decided subsequent to oral argument in the court below.

While recognizing that nonfinal administrative orders may be unreviewable even where they result in " 'serious irreparable injury' " (ARINC App. 62 n.36), the court of appeals also held that in "the present case, as in *Southern Railway* . . . a complaint procedure under the Communications Act comparable to that of the Interstate Commerce Act is available for former Telpak customers" (*id.* at 60). The court recognized that under the statutory complaint provisions the "protestants may seek actual damages if they believe rates are unlawfully high" and that such procedures "are a realistic remedy for Telpak customers" (*id.* at 60-61 n.34). Thus, the court concluded: "Given the complaint remedy under the Communications Act, no substantial prejudice of an irreparable nature exists in this case" (*id.* at 62).

With regard to the Section 214 issue, the court affirmed the FCC's finding that the termination of the TELPAK rate schedule "did not in fact discontinue, reduce, or impair any service at all," because "all it did was eliminate a rate discount, thereby effectuating a rate increase" (ARINC App. 23-24). In these circumstances, the court explained: "Were we to accept petitioner's view, virtually every rate increase might be argued to be a discontinuance of 'service' requiring a prior finding of convenience and necessity by the Commission. The attendant burdens would be enormous" (*id.* at 24).

The court unanimously denied ARINC's petition for rehearing and suggestion for rehearing *en banc* with respect to the Section 214 issue in orders of November 26, 1980 (ARINC App. 196). The court unanimously denied the United States' petition for rehearing and suggestion for rehearing *en banc* with respect to the reviewability issue in orders of January 27, 1981 (ARINC App. 197, 198).

REASONS FOR DENYING THE WRIT

While ARINC also raises an additional issue (see pp. 17-20, *infra*), the basic question presented by ARINC and the Government agencies as TELPAK users is whether the FCC's discretionary decision not to require the submission of certain tariff supporting material under its Rule 61.38 is subject to judicial review. In an unavailing attempt to differentiate controlling decisions of this Court, the petitioning TELPAK users argue that the Court should issue a writ of certiorari to review this question because of the alleged lack of a procedure by which the TELPAK users practically can challenge the increased rates resulting from the termination of TELPAK. As the D.C. Circuit correctly held (p. 7, *supra*), however, the complaint provisions of the Communications Act provide an entirely sufficient and realistic remedy for assuring that the TELPAK users are charged no more than just and reasonable rates. Thus, the petition of the United States simply misstates the question presented when it asserts that the rate increase "is not subject to investigation. . . upon subsequent complaint by affected users" (U.S. Pet. I).

Moreover, the TELPAK users' argument is premature and based on nothing but conjecture about the effectiveness of future complaint proceedings. In short, their argument does not provide a basis to distinguish this case from others in which this Court reached the same conclusion as did the court of appeals here. In all respects, the decision here represents the well-considered application of controlling decisions of this Court, and it does not merit further review.

I. THE COURT OF APPEALS' HOLDING THAT THE FCC'S ACCEPTANCE OF THE TARIFF FILING IS NOT SUBJECT TO JUDICIAL REVIEW IS COMPELLED BY A CONSISTENT LINE OF DECISIONS BY THIS COURT AND PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW

The D.C. Circuit's decision regarding reviewability is squarely based upon *Arrow Transportation Co.* v. *Southern Railway,* 372 U.S. 658 (1963), and *Southern Railway* v. *Seaboard Allied Milling Corp.,* 442 U.S. 444 (1979), in which this Court held that a regulatory agency's decision whether to suspend or to investigate a tariff filing is committed to that agency's exclusive discretion and is not reviewable, not even if the tariff filing is "patently illegal" and not even for "abuse of discretion." 442 U.S. at 455-56 n.9.[7] The court of appeals in the present case properly recognized that a decision to accept a tariff filing is inextricably intertwined with the agency's nonreviewable suspension and investigation decisions, and held that the FCC's decision not to reject a tariff filing must therefore also be nonreviewable.[8] The D.C. Circuit had previously reached the same conclusion in *Papago Tribal Utility Authority* v. *FERC,* 628 F.2d 235 (D.C. Cir.), *cert. denied,*

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[7] This doctrine of nonreviewability of agency decisions regarding the effectiveness of tariff filings has been repeatedly stressed and applied by this Court. See also *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289 (1975); *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973); *United States* v. *SCRAP,* 412 U.S. 669 (1973).

[8] The statutory ratemaking scheme of the Communications Act under which this case arises was expressly modeled after that of the Interstate Commerce Act which was at issue in *Arrow* and *Southern Railway.* See S. Rep. No. 781, 73d Cong., 2d Sess. 2, 4 (1934); H. Rep. No. 1850, 73d Cong., 2d Sess. 5-6 (1934); *American Broadcasting Cos.* v. *FCC,* No. 78-1968, slip op. at 6 (D.C. Cir. April 28, 1980); *American Tel. & Tel. Co.* v. *FCC,* 487 F.2d 865, 873 n.15, 874 n.17 (2d Cir. 1973). See also U.S. Pet. 9 n.12.

No. 80-465 (Dec. 15, 1980),[9] and in reasoning which was also applied in the instant case (ARINC App. 58-61), the court in *Papago* explained (628 F.2d at 243):

> "From *Arrow Transportation* and *Southern Railway* it follows *a fortiori* that the order presented for review in this case is nonreviewable. The decision whether to reject or to accept a rate filing is based on precisely the same information, and primarily the same considerations, that govern decisions to suspend or not to suspend, to investigate or not to investigate. The decision to accept a rate filing is a necessary adjunct to the unreviewable decision to suspend and investigate. It would make little sense to declare orders concerning suspension and investigation unreviewable if the courts may review the related order to accept a rate filing."[10]

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[9] The only arguable distinction between *Papago* and the present case is that in *Papago* the agency had initiated an investigation into the tariff filing, whereas here the Commission found no grounds warranting an investigation. But as the D.C. Circuit correctly held (ARINC App. 66), this is a distinction without meaning. Because an agency decision not to investigate is not reviewable under the holding of *Southern Railway*, it follows *a fortiori* that an otherwise nonreviewable decision to accept a tariff filing cannot become reviewable merely because the agency in its exclusive discretion has declined to initiate an investigation.

[10] To the extent that ARINC contends that the decision in *Papago* and the decision in the present case are in conflict with decisions in other circuits and prior decisions of the D.C. Circuit, that argument is without merit. The Second and Fifth Circuit decisions cited by ARINC (ARINC Pet. 13 n.14) do not even address the issue of reviewability, and each of the prior D.C. Circuit decisions which ARINC mentions (ARINC Pet. 13 n.13) was specifically considered and reconciled by the D.C. Circuit itself in *Papago*. 628 F.2d at 246-47.

(footnote continues)

The nature of the alleged error committed by the Commission—its asserted "abuse of discretion" in waiving Rule 61.38—particularly compelled the D.C. Circuit to abstain from review. When promulgating Rule 61.38, the Commission stressed that its rule was intended to provide the Commission with "information by which, in the reasonable exercise of [its] discretion" the Commission can determine whether " 'an investigation and suspension of proposed rates should be ordered.' " *Amendment of Part 61 of the Commission's Rules,* 40 F.C.C.2d 149, 152 (1973). To compel rejection of a tariff filing for failure to require compliance with Rule 61.38, therefore, would effectively subject to judicial review the Commission's exclusive discretionary decisionmaking processes with respect to suspension and investigation and would "avoid the strictures of *Arrow Transportation* and *Southern Railway* on the nicest of distinctions." *Papago,* 628 F.2d at 243. Moreover, it would disregard this Court's recognition in *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532, 538-39 (1970), that an agency has the inherent power to relax, modify or waive filing requirements such as Rule 61.38 because rules of this type are "mere aids to the exercise of the agency's independent discretion" and

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(footnote continued)

Notably, the Solicitor General does not assert the existence of any conflict among the courts of appeals, and indeed in *Papago* the Solicitor General opposed the issuance of a writ of certiorari to resolve the same alleged conflict posed by ARINC, stating that "[t]he decision below is consistent with the decisions of this Court and other courts of appeals, and does not merit further review." Solicitor General's Brief for the Federal Energy Regulatory Commission In Opposition, p. 3, No. 80-465. Moreover, as the Solicitor General also recognized in *Papago,* the alleged existence of an intra-circuit conflict is primarily a matter to be resolved by the court of appeals, not this Court (*id.* at 7).

are "not intended primarily to confer important procedural benefits upon individuals." See also *Papago,* 628 F.2d at 246-47.[11]

In these circumstances, the Government's characterization of the Commission's waiver of Rule 61.38 as "lawless" (U.S. Pet. 8) is unfounded, as is the Government's entire argument regarding Rule 61.38. Thus, while the Government asserts that the Commission adopted Rule 61.38 to provide the public with an opportunity to participate in ratemaking (*id.* at 7), the FCC decision cited in support of this proposition states only that the rule was intended "to provide the Commission and the staff with the information necessary to evaluate tariff filings." *Amendment of Part 61 of the Commission's Rules,* 25 F.C.C.2d 957, 961 (1970). Similarly, the Government's assertion that in this case "the Commission required no information at all" (U.S. Pet. 8 n.10) disregards the massive amount of material before the Commission from its comprehensive investigation into the TELPAK rates which had just been completed and from its investigation into AT&T's single-channel rates which was in progress. See, *e.g., AT&T, Revisions of Tariff FCC No. 260 (TELPAK),* 61 F.C.C.2d 587 (1976) (ARINC App. 82-170); *AT&T, Charges for Private Line Services,* 59 F.C.C.2d 428 (1976); 62 F.C.C.2d 35 (1976); 65 F.C.C.2d 295

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[11] This very principle was stressed by the Solicitor General in opposing certiorari in *Papago*:

> "... the Commission's procedural filing requirements were not intended to confer benefits on private parties and may be relaxed or waived within the Commission's discretion. The Commission's discretionary decision in this case to relax its own procedural rules is not subject to judicial review. [Citing *American Farm Lines.*]"

Solicitor General's Brief for the Federal Energy Regulatory Commission In Opposition, p. 5, No. 80-465.

(1977). Thus, review of the Commission's decision accepting the tariff filing in this case plainly would have invaded the province which under the principles of *Arrow, Southern Railway* and *American Farm Lines* is reserved exclusively to the discretion of the Commission.

Petitioners nonetheless attempt to distinguish these controlling decisions by this Court on the ground that in *Southern Railway* the availability of complaint procedures offered ratepayers a "fair and meaningful chance for relief" (U.S. Pet. 9; see also ARINC Pet. 16), whereas here, they assert, the increased rates resulting from the termination of TELPAK are "as a practical matter, beyond subsequent challenge by affected users" (U.S. Pet. 7). Petitioners acknowledge, as they must, that Sections 206-209 of the Communications Act (ARINC App. 205-06) set out complaint procedures that are comparable in all respects to those involved in *Southern Railway* (U.S. Pet. 9 n.12),[12] but contend that these procedures are inadequate in this case because any complaint will have to be directed to the single-channel private line rates rather than to "higher bulk rates" (*id.* at 9). This argument is without foundation, either in *Southern Railway* or in the Communications Act.

First, neither *Arrow* nor *Southern Railway* depended upon the clear availability of alternative forms of relief. In *Arrow,* the Court held suspension decisions to be nonreviewable despite the petitioners' claim that allowing the rates to become effective would "inevitably and immediately" drive them out of business. 372 U.S. at 672-73; see also *Southern Railway,* 442 U.S. at 459 n.12. And while the Court in *Southern Railway* acknowledged that the availability of complaint proceedings is a factor which

[12] *Compare, e.g.,* 47 U.S.C. § 208 *with* 49 U.S.C. § 13(1) (quoted in *Southern Railway,* 442 U.S. at 450-51 n. 5).

strongly weighs against the reviewability of a decision not to investigate (442 U.S. at 463), the Court did not rest its decision solely on that basis.[13] Indeed, the Court specifically pointed out that the Commission's discretionary authority to investigate tariff filings was independent from and not linked to the availability of complaint proceedings. *Id.* at 463-64.

But, in any event, it is entirely immaterial that a complaint would have to be directed to the single-channel rates rather than to increased TELPAK rates. Under the Communications Act, a carrier has an obligation to charge rates which are just, reasonable and non-discriminatory (see 47 U.S.C. §§201, 202), and in a complaint proceeding the TELPAK users clearly could challenge the single-channel rates within this statutory framework, including arguing that volume use justifies a discount rate to them. If the rates are found to be just and reasonable, that is all to which the TELPAK users are entitled; if the rates are found to be unjustly high, the Commission could award actual damages. 47 U.S.C. §§206, 209 (ARINC App. 205, 206). In all events, the TELPAK users' claims would then be subject to judicial review. As the court of appeals correctly held, the complaint procedures under the Communications Act "are a realistic remedy for Telpak customers" (ARINC App. 60-61 n.34).

Indeed, although they speculate about the alleged futility of a complaint proceeding, petitioners have not

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[13] Rather the Court found "the necessary ' "clear and convincing evidence" that Congress meant to prohibit all judicial review' of the Commission's limited decision not to initiate an investigation" to be provided by the permissive language of Section 15(8)(a) of the Interstate Commerce Act (which is the cognate provision of Section 204 of the Communications Act), as well as by its place in the statutory scheme, its legislative history and the light shed on it by prior cases such as *Arrow*. 442 U.S. at 462.

demonstrated in what respect the procedures would be uniquely inadequate in this case. Certainly, the Commission's decision not to expand its ongoing investigation of the single-channel rates to include the question of volume discounts (U.S. Pet. 9-10) has no bearing on the Commission's statutory obligation under Section 208 of the Act "to investigate the matters complained of in such manner and by such means as it shall deem proper" (ARINC App. 206). Just as clearly, the Commission's acceptance of the TELPAK termination filing (ARINC Pet. 18-19) did not in any manner prejudge the lawfulness of the single-channel rates as applied to the TELPAK users. And the absence of discovery until after the complaint is filed[14] and the possible difficulty of proving damages (ARINC Pet. 19-20) are true of all complaint proceedings.

In fact, the TELPAK users' "dilemma" (U.S. Pet. 9, n.13) has nothing to do with the adequacy of the complaint procedures, but stems from the questionable nature of their position on the merits that they are *entitled* to a preferential discount from just and reasonable single-channel rates. To the extent that such a claim can be justified, it would appear to be on the basis of cost differences arising from volume use.[15] But, it has been long held by the Commission, and affirmed by the courts,

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[14] The right of post-complaint discovery clearly would be available to the TELPAK users. Section 1.311 of the FCC's Rules (47 C.F.R. § 1.311) deals with discovery, and by its terms it is applicable to any case of adjudication that has been designated for hearing, including, therefore, complaint proceedings under Sections 206-209 of the Communications Act.

[15] As the Commission long ago held, "the charges made for service must be justified in relation to the costs involved and no segment of the users may reasonably expect charges which unduly discriminate against others even though they may benefit from them." *AT&T, TELPAK Service & Channels, supra,* 37 F.C.C. at 1114.

that there are "no material cost differences" in providing service in bulk under the TELPAK rate schedule, as opposed to providing it under single-channel tariffs. *AT&T, TELPAK Service & Channels, supra,* 38 F.C.C. at 381, *aff'd sub nom. American Trucking Associations, Inc.* v. *FCC,* 377 F.2d 121 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 943 (1967).[16] It is this result that the TELPAK users fear, but this matter is not before this Court, and it is not properly before any reviewing court "until the statutory complaint procedures have been followed" (ARINC App. 62).

Finally, there is no basis for petitioners' assertion that this case "presents a question of recurring importance meriting review by this Court" (U.S. Pet. 11). The factual situation here involving the termination of a discount bulk rate schedule has not arisen previously in the administration of the Communications Act, and there is no basis upon which to expect that it is likely to recur. Although petitioners make claims to the contrary, they have been driven to the pure speculation that at some time AT&T may attempt to terminate its WATS tariff (U.S. Pet. 11; ARINC Pet. 25-28). As ARINC recognizes, however, when the FCC recently ordered the resale and sharing of WATS, AT&T did not attempt to terminate WATS, but rather filed restructured rates supported by Rule 61.38 data (ARINC Pet. 26). Petitioners have thus failed to demonstrate that this is any more than an isolated case involving the Commission's exercise of discretion within a realm which this Court has consistently held is exclusively the agency's.

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[16] The situation with respect to TELPAK is thus wholly unlike the Government's bulk mail rate example because the fundamental premise of that example is that "the costs of handling bulk mail are less than those of handling regular first class" (U.S. Pet. 9-10 n.13).

II. THE COURT OF APPEALS' AFFIRMANCE OF THE FCC'S HOLDING THAT THE TERMINATION OF THE TELPAK RATE SCHEDULE IS NOT A DISCONTINUANCE OF SERVICE IS WELL FOUNDED AND DOES NOT WARRANT REVIEW BY THIS COURT

Petitioner ARINC (but not the United States) raises another issue, namely, that the court of appeals erred in upholding the FCC's determination that the tariff filing did not result in any discontinuance of "service to a community, or part of a community" within the meaning of Section 214 of the Act. Again, this simply is not an issue which justifies the exercise of this Court's discretionary power of review.

The FCC has long and consistently held that the services available under the TELPAK rate schedule are the same as, and utilize the same facilities as, the services offered under AT&T's other private line tariffs. This was the basic predicate for the Commission's holding that the termination of TELPAK did not involve a discontinuance of service under Section 214 (ARINC App. 72-73), and it was the basis on which the court of appeals affirmed the Commission. As the D.C. Circuit held (*id.* at 24):

> "All the services which had been offered under the TELPAK tariff were still available thereafter from AT&T pursuant to other tariffs or other sections of the same tariff; only the rates differed."

The court of appeals' decision upholding the Commission was fully supported by its analysis of the record and properly accorded " ' deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965)" (ARINC App. 57). See also *United States* v. *City of*

Chicago, 400 U.S. 8, 10 (1970). Moreover, the court's decision was entirely consistent with the previous decisions in *American Trucking Associations, Inc.* v. *FCC,* 377 F.2d 121 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 943 (1967), where the court upheld the FCC determination that TELPAK and single-channel private line services are "like" communications services under the Communications Act, and in *American Telephone & Telegraph Co.* v. *FCC,* 449 F.2d 439, 446 n.5 (2d Cir. 1971), in which the Second Circuit observed that a "customer uses precisely the same physical facilities whether his service is ordinary private-line, Telpak, or shared Telpak."

Indeed, the conclusion of the court of appeals that the termination of TELPAK would not result in a discontinuance of service is shared by the United States Government, the largest TELPAK user. The Solicitor General has not sought review on this issue, and in the court below the Government expressly conceded that "[t]he actual services provided under both Telpak and single-channel rates are similar, and thus the abolition of Telpak will not leave subscribers without service."[17] And in other pleadings filed with the court of appeals in this case, the Government further acknowledged that the private line services which it uses "will be provided in identical form whether or not labeled 'Telpak' " and that:

> "We agree, under the circumstances of this case, with the Commission's current view that Telpak is not a separate, uniquely identifiable service . . . Telpak's elimination in that event would not violate Section 214. . ."[18]

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[17] Brief for Respondent United States of America, p. 16, D.C. Cir. Nos. 77-1333 *et al.*

[18] Memorandum in Support of the Motion of United States for Stay, pp. 9, 13, D.C. Cir. Nos. 77-1333 *et al.*, June 15, 1977.

Against this backdrop, ARINC has to resort to claims that some specialized services are not available under other private line tariffs, that TELPAK in any event has distinct characteristics, and that the FCC's determination in this case is inconsistent with other Commission decisions construing Section 214 (ARINC Pet. 22-24). ARINC is plainly grasping at straws. It did not raise the alleged unavailability of any particular service either before the Commission or in its principal briefs below, and, in fact, the "services" to which it now refers will be available upon termination of TELPAK.[19] Moreover, the FCC has long recognized that any distinct characteristic of TELPAK is "not a distinction attributable to service or facilities furnished only under TELPAK, but is rather a matter of the pricing characteristics of that tariff." *AT&T, TELPAK Service & Channels, supra,* 37 F.C.C. at 1113. And finally, what ARINC characterizes as inconsistent Commission decisions do not undercut the decision here at all: the asserted "square holding" of *Graphnet Systems, Inc.*, 63 F.C.C.2d 402, 410 n.9 (1977) is pure and simple dicta, and the *Resale and Shared Use* decisions have no

[19] In this connection, ARINC singles out a minor offering (230.4 Kbps wideband data service) and improperly suggests that it will be unavailable upon the termination of TELPAK (ARINC Pet. 23 n.20). However, AT&T requested and received permission from the FCC in 1977 to furnish this wideband offering under a tariff classification (Tariff FCC No. 258) other than TELPAK. In fact, that offering is currently provided under Tariff No. 258, and hence there will be no unavailability of service as ARINC contends. See AT&T Transmittal No. 13553, Sept. 22, 1980. Moreover, the shared use restrictions on switched private line services to which ARINC refers (ARINC Pet. 22-23) do not affect the availability of service, but rather the permissible use of service, and thus do "not in any way demonstrate that TELPAK is not a 'like service.'" *AT&T, TELPAK Service & Channels, supra,* 37 F.C.C. at 1115. In any event, private line service is still available on a single-channel basis, which will allow all of the airlines' present communications needs to be met.

bearing whatever on the issue here.[20] In sum, ARINC has not begun to provide a basis sufficient to warrant review of the well-founded decision of the court below.

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[20] Thus, the question on review in the *Resale and Shared Use* case was whether the resale of communications service is common carrier activity, and after holding that it was, the Second Circuit merely observed that one of the obligations imposed upon common carriers is the necessity to obtain Section 214 authority before discontinuing service. *American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17, 24-25 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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